Nos. 83-1046 and 83-6087

In the Supreme Court of the United States

OCTOBER TERM, 1983

GJERGI GJIELI, PETITIONER

v.

UNITED STATES OF AMERICA

NICKOLA LULGJURAJ AND
ZEFF LULGJURAJ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' convictions should be reversed as a sanction for prosecutorial misconduct that occurred during the investigation of this case and did not prejudice petitioners.

2. Whether a payment to a federal official for the purpose of inducing him to use his influence to help effect the unlawful escape of a state prisoner violates the federal bribery statute, 18 U.S.C. 201.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-32a)[1] is reported at 717 F.2d 968.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1983. A petition for rehearing was denied on December 14, 1983. The petition for a writ of certiorari in

[1] "Pet. App." refers to the appendix to the petition in No. 83-1046.

No. 83-1046 was filed on December 22, 1983. The petition for a writ of certiorari in No. 83-6087 was filed on January 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioners were convicted of bribing a public official, in violation of 18 U.S.C. 201(b)(3), and conspiring to commit that offense, in violation of 18 U.S.C. 371. Petitioner Gjieli was sentenced to concurrent prison terms of 15 years on the substantive count and 5 years on the conspiracy count. Petitioner Zeff Lulgjuraj was sentenced to concurrent terms of five years' imprisonment. Petitioner Nickola Lulgjuraj was sentenced to concurrent terms of three years' imprisonment. The court of appeals affirmed, with Judge Lively dissenting in part.

1. Petitioner Gjieli was a bartender at a bar frequented by Robert Van Hengel, an agent of the Bureau of Alcohol, Tobacco and Firearms (ATF). Petitioner Gjieli offered Agent Van Hengel $100,000 "plus the biggest present he had ever received" if Van Hengel could use his "contacts" to help petitioner Zeff Lulgjuraj escape from a state prison in Michigan, where he was serving four life sentences. Pet. App. 2a-3a & n.1. Van Hengel warned Gjieli that "such an offer to a federal agent could get him in serious trouble" (*id.* at 2a), but Gjieli persisted.

Van Hengel reported the offer to his supervisor and subseqently engaged Gjieli in a conversation that was secretly recorded. They discussed a possible trial run in which Van Hengel would show what he was able to do. Gjieli assured Van Hengel that the $100,000 would be "cash on the line." Pet. App. 3a.

After several weeks during which there was no contact between Gjieli and Van Hengel, Van Hengel returned to the bar and was unable to find Gjieli. Van Hengel then consulted with an Assistant United States Attorney, and they decided that some step should be taken to signal Gjieli that Van Hengel was ready to cooperate. The Assistant United States Attorney accordingly presented a request for a writ of habeas corpus ad testificandum to a federal district judge, seeking petitioner Zeff Lulgjuraj's appearance before a grand jury investigating an arson case. The judge issued the writ. Unknown to the judge, there was in fact no such arson investigation in progress and no plan to take Lulgjuraj before a grand jury. Pet. App. 3a-4a.

An ATF agent took the writ to the state prison where Zeff Lulgjuraj was confined and obtained custody of him. A group of agents and United States marshals then took him to a nearby airport where Van Hengel was waiting in an unmarked car. Van Hengel told Lulgjuraj that he should relate the incident to Gjieli: "You tell him we had you out. This was my idea to get you here. Just tell him the guy he talked to in the bar, in DeLuca's, we had you out. Airplanes were here. OK?" Lulgjuraj appeared not to know of Gjieli's offer of $100,000, but Lulgjuraj told Van Hengel that his son, petitioner Nickola Lulgjuraj, would be in touch with Van Hengel. Pet. App. 4a-5a.

Later that day, Van Hengel received a telephone call from Nickola Lulgjuraj. A few days later, he also received a call from Gjieli, and he met with Nickola Lulgjuraj and Gjieli. At those meetings, which were secretly recorded, Nickola Lulgjuraj, Gjieli, and Van Hengel discussed, and Nickola Lulgjuraj and Gjieli then paid, $10,000 in "front money" to Van Hengel and another AFT agent. Approximately two weeks later, Nickola Lulgjuraj delivered $90,000 in cash to Van Hengel. Pet. App. 5a.

2. After petitioners were convicted, the district court held a hearing on whether the Assistant United States Attorney should be held in contempt for having deceived the district judge who issued the writ of habeas corpus ad testificandum (see Pet. App. 34a-39a). After hearing an explanation from the prosecutor and his supervisor, the district court reprimanded the prosecutor, and the prosecutor apologized to the district judge who issued the writ (see *id.* at 22a, 38a). The court of appeals strongly condemned the prosecutor's actions (see *id.* at 22a n.11) and concluded (*id.* at 22a (footnote omitted)): "Although we might well have imposed a harsher sanction we do not believe the District Court abused its discretion."

ARGUMENT

1. Petitioners contend (83-1046 Pet. 6-10; 83-6087 Pet. 5) that their convictions should be overturned because the Assistant United States Attorney and the ATF agents acted improperly in obtaining Zeff Lulgjuraj's temporary release on the writ of habeas corpus ad testificandum. While these actions were inexcusable, it is clear that petitioners are not entitled to relief.

In *United States* v. *Morrison*, 449 U.S. 361 (1981), this Court held that even if a defendant's constitutional rights have been deliberately violated, dismissal of the indictment is "plainly inappropriate" unless there is "demonstrable prejudice, or substantial threat thereof" (*id.* at 365). Here, as the court of appeals noted, "[n]one of the governmental activity with respect to the writ of habeas corpus incident violated any protected right of the defendants" (Pet. App. 21a) — much less their constitutional rights.[2]

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[2]Petitioner Gjieli asserts, without explaining, that the Assistant United States Attorney's action "most clearly infringed on Zeff Lulgjuraj's residual liberty rights" (83-1046 Pet. 9). Even apart from the question whether petitioner Gjieli can claim a right to relief on this

Moreover, the prosecutor's deception of the district judge did not prejudice petitioners in any way. Petitioners are in the same position they would have been in if federal authorities had, through the cooperation of Michigan state authorities, lawfully obtained temporary custody of Zeff Lulgjuraj for the purpose of exposing the conspiracy. Petitioners could not have complained about such a lawful procedure; yet it would have had precisely the same effect on petitioners as the irregular procedures that were in fact followed here.

The district court, not petitioners, was aggrieved by the prosecutor's actions, and that court responded in a way that it and the court of appeals — without dissent on this issue —deemed appropriate. To reverse petitioners' convictions would give them a wholly unwarranted windfall. See also *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), slip op. 6-7 (footnote omitted) ("deterrence is an inappropriate basis for reversal where, as here, * * * means more narrowly tailored to deter objectionable prosecutorial conduct are available").[3]

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basis, it is untenable to suggest that a brief release from prison into the custody of officials — the kind of action that would accompany a transfer from one prison to another — invades a protected liberty interest. Compare *Montanye* v. *Haymes*, 427 U.S. 236 (1976), and *Meachum* v. *Fano*, 427 U.S. 215 (1976), with *Vitek* v. *Jones*, 445 U.S. 480, 491-494 (1980).

[3]It is unclear whether petitioners now assert that they were entrapped as a matter of law (see 83-6087 Pet. 5). But petitioner Zeff Lulgjuraj did not claim below that he was entrapped (see Pet. App. 21a), and in view of the fact that federal agents never initiated contact with either Gjieli or Nickola Lulgjuraj, any such claim by them would be insubstantial. In any event, the only action initiated by the federal agents was a signal that they would be able to aid in Zeff Lulgjuraj's escape; they took this action only after Gjieli had spontaneously offered a bribe to Van Hengel, and the government action was followed almost immediately by contacts, and subsequent offers of money, from Gjieli and Nickola Lulgjuraj. Such government action cannot constitute entrapment as a matter of law.

2. Petitioners also assert (83-1046 Pet. 10-11; 83-6087 Pet. 4-5) that their actions did not fall within the federal bribery statute because the bribe was not given "in connection with the federal official's line of duty" (83-1046 Pet. 11). This was also the basis of Judge Lively's dissent; he stated (Pet. App. 23a):

> As I view the case the question presented is whether it is a federal offense to offer or pay a bribe to an officer of the United States for the performance of an act which would violate the laws of a state, but which would violate no law of the United States, and which is totally unrelated to the officer's official duties. * * * I see nothing in the language or history of the federal bribery statute * * * to indicate that Congress ever intended to make it a federal offense to offer or pay a bribe to a person who happens to be an employee of the United States to violate a state law by actions which have no conceivable relation to the bribee's official duties.

Petitioners and Judge Lively, however, misapprehend the charge against petitioners. The indictment charged, and the jury found, that petitioners did "corruptly give, offer and promise * * * One Hundred Thousand Dollars * * * to Special Agent Van Hengel, ATF, a public official, with intent to induce him *to do an act in violation of his duty*; that is, *to use his knowledge, influence and official position* to effect the escape of Zeff Lulgjuraj from the lawful custody of the State of Michigan Department of Corrections." Pet. App. 5a n.4 (emphasis added). Thus, contrary to the suggestions of petitioners and Judge Lively, petitioners were not convicted of bribing Van Hengel to take actions "hav[ing] no conceivable relation to [his] official duties"; they were convicted of bribing Van Hengel to use his official position to help effect Zeff Lulgjuraj's escape. If this were a case in which a public employee was paid to effect a prisoner's escape by methods that could be used by any person,

whether or not he was a public official — force, for example — the issue addressed by petitioners and the dissent might be implicated. But it is not implicated here, because petitioners were convicted of attempting to induce a public official to use his office and his influence to further their objectives.

While it is true, as petitioners assert, that Van Hengel was not directly responsible for keeping state prisoners in custody, petitioners apparently believed that he could use his influence as a law enforcement officer to aid in Zeff Lulgjuraj's escape. As the court of appeals noted, "Van Hengel was approached by [petitioners] because he was a government employee and because they erroneously perceived that he had the power to effect the release of Zeff Lulgjuraj from state prison as a result of that status" (Pet. App. 15a). Indeed, as the court of appeals also noted, and as Van Hengel demonstrated to petitioners, it is not clear that petitioners were necessarily mistaken in this belief (see Pet. App. 5a-6a n.5). But even if they were mistaken, the courts of appeals have consistently ruled that a person who offers a bribe to a public official cannot escape criminal liability by showing that, unbeknownst to him, the official lacked the authority (or was otherwise unable) to do the act that the bribe was intended to induce. See, *e.g.*, *United States* v. *Arroyo*, 581 F.2d 649, 655 n.10 (7th Cir. 1978), cert. denied, 439 U.S. 1069 (1979); *United States* v. *Evans*, 572 F.2d 455, 480-481 (5th Cir.), cert. denied, 439 U.S. 870 (1978); *United States* v. *Anderson*, 509 F.2d 312, 332 (D.C. Cir. 1974), cert. denied, 420 U.S. 991 (1975); *United States* v. *Hall*, 245 F.2d 338, 339 (2d Cir. 1957); *United States* v. *Troop*, 235 F.2d 123, 124-125 (7th Cir. 1956); *Wilson* v. *United States*, 230 F.2d 521, 524-525 (4th Cir.), cert. denied, 351 U.S. 931 (1956); *Hurley* v. *United States*, 192 F.2d 297 (4th Cir. 1951). See also *United States* v. *Duz-Mor Diagnostic Laboratory, Inc.*, 650 F.2d 223, 227 n.5 (9th Cir. 1981);

United States v. *Lubomski*, 277 F. Supp. 713 (N.D. Ill. 1967). Any other approach would exempt from the bribery statutes many acts that Congress plainly intended to proscribe.

Judge Lively concluded that bribery could be committed when "the act sought by the briber * * * [is] a violation of some official duty of the person bribed. The act sought must be 'within the range of official duty' of the person bribed" (Pet. App. 31a (citation omitted)). As the indictment shows on its face, the act of which petitioners were convicted satisfies this test. Indeed, it satisfies even the test suggested by petitioner Gjieli himself — "that the bribe or offer be in connection with the federal official's line of duty" (83-1046 Pet. 11). Petitioners' reliance on *United States* v. *Birdsall*, 233 U.S. 223 (1914), is inexplicable; in *Birdsall*, this Court gave the federal bribery statute a broad scope that is clearly sufficient to cover conduct like petitioners' (*id.* at 230-231):

> Every action that is within the range of official duty comes within the purview of these sections. * * * To constitute it official action, it was not necessary that it should be prescribed by statute * * *. Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the department and fixed the duties of those engaged in its activities. * * * In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the * * * statutes against bribery.

Similarly, in *Schneider* v. *United States*, 192 F.2d 498 (9th Cir. 1951), cert. denied, 343 U.S. 914 (1952), on which petitioners also rely (83-1046 Pet. 11), the court ruled that

the offense of bribery can be established if the alleged bribe was offered "in connection with [an official's] line of duty" (192 F.2d at 500) or if "the act or omission to which the bribe was directed was within the scope of official conduct" (*id.* at 501). In neither of these cases was a bribery conviction set aside on the ground that the action the payer of the bribe sought to induce was not closely enough related to the official duties of the recipient. Finally, petitioners attempt to rely on *Blunden* v. *United States*, 169 F.2d 991 (6th Cir. 1948); but the court of appeals carefully distinguished its own decision in *Blunden*, explaining that *Blunden* involved a different provision of the federal bribery statute (see Pet. App. 10a-16a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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